Supreme Court, U.S.
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No. 92-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

TRACY TEMPLETON,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

SUPREME COURT OF ILLINOIS

No. 71783
July 30, 1992

TRACY TEMPLETON, Appellant,
v.
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, Appellee.

JUSTICE CLARK delivered the opinion of the court:

The plaintiff, Tracy Templeton, was an employee of the defendant railroad, Chicago and North Western Transportation Company. On January 27, 1984, plaintiff was performing track work on a bridge located in Pekin, Illinois. Plaintiff fell through an opening in the bridge deck and landed on ice 31 feet below the bridge. Plaintiff filed suit in the circuit court of Cook County under the Federal Employers' Liability Act (45 U.S.C. §51 (1988)), to recover damages for the injuries he sustained as a result of the fall. A jury awarded plaintiff damages in the amount of $3.5 million after a reduction of 14% for plaintiff's contributory negligence.

Defendant appealed contending, *inter alia*, that the trial court improperly admitted into evidence "fall-protection" regulations issued by the Federal Occupational Safety and Health Administration (OSHA) and instructed the jury on the same. The appellate court reversed (211 Ill.App.3d 489), and we granted plaintiff's petition for leave to appeal (134 Ill.2d R.315).

At issue in this case is whether OSHA's fall-protection regulations applied to the railroad bridge upon which plaintiff was working at the time of the accident. Defendant argues that OSHA's regulations did not apply because the Federal Railroad Administration (Railroad Administration) had asserted its exclusive authority over railroad bridges and, thereby, displaced OSHA's jurisdiction over the bridge. Defendant relies on the Railroad Administration policy statement issued in 1978 as support for this argument.

The Occupational Safety and Health Act of 1970 (29 U.S.C. §651 *et seq.* (1988)) was enacted to address the problems caused by personal injuries and illnesses arising out of working conditions. As part of the solution to this problem, Congress authorized the Secretary of Labor to "set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." (29 U.S.C. §651(b)(3) (1988).) Pursuant to the Occupational Safety and Health Act, OSHA has general authority to promulgate health and safety regulations relative to hazards arising out of working conditions.

At trial, plaintiff introduced into evidence two OSHA fall-protection regulations which are contained in OSHA's construction industry regulations. (See 29 C.F.R. §§1926.104, 1926.105 (1991).) One of the regulations entered into evidence provides in pertinent part:

> "Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical." 29 C.F.R. §1926.105(a)(1991).

Because this regulation was incorporated into the general industry standards applicable to all industries (29 C.F.R. §1910.12 (1991)), plaintiff claims it applies to work on railroad bridges.

Defendant argues that OSHA's fall-protection regulations do not apply to this case because the Railroad Administration has specifically preempted OSHA from regulating work on railroad bridges. Section 4(b)(1) of the Occupational Safety and Health Act provides in pertinent part:

> "Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies *** exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." (29 U.S.C. §653(b)(1) (1988).)

In order for another Federal agency, in this case the Railroad Administration, to preempt OSHA regulations under section 4(b)(1), that agency must have statutory authority to regulate a specific industry and it must exercise that authority over a particular working condition. *Southern Pacific Transportation Co. v. Usery* (5th Cir. 1976), 539 F.2d 386.

Under the Federal Railroad Safety Act of 1970 (45 U.S.C. §421 *et seq.* (1988)), the Railroad Administration is the primary agency responsible for regulating the railroad industry and has the statutory authority to issue safety regulations for railroads which would displace OSHA regulations. In 1978, the Railroad Administration issued a policy statement which outlined its position on those areas of the railroad industry for which the Railroad Administration was preempting OSHA regulations.

(43 Fed. Reg. 10583 (1978).) Although the policy statement did not promulgate any new safety regulations, it was sufficient to preempt OSHA from exercising jurisdiction over *some* aspects of the railroad industry. See *Velasquez v. Southern Pacific Transportation Co.* (5th Cir. 1984), 734 F.2d 216; *Secretary of Labor v. Consolidated Rail Corp.* (1982), 10 O.S.H. Cas. (BNA) 1577.

However, it is clear from the policy statement that the Railroad Administration did not intend to completely displace OSHA regulations. The policy statement envisions an evolving, cooperative relationship between the two Federal Agencies. For example, in the policy statement the Railroad Administration stated the following:

> "[The Railroad Administration] recognizes that OSHA currently is not precluded from exercising jurisdiction with respect to conditions not rooted in railroad operations nor so closely related to railroad operations as to require regulation by [the Railroad Administration] in the interest of controlling predominant operational hazards.
>
> ***
>
> *** We believe the policy set forth in this document will assure that each of the principal Federal agencies charged with the responsibility for carrying out this program, that is, [the Railroad Administration] and OSHA, will concentrate its efforts in those areas in which it possesses the greatest experience and expertise. In those cases in which there may be some question as to which is the primary regulatory agency, *cooperative efforts between the two agencies should avoid the creation of regulatory gaps* on the one hand, or unnecessary duplication on the other. At any time that a hazardous working condition impacts upon the overall safety of railroad operations, [the Railroad Administration] will take

> the initiative in developing a proper regulatory response." (Emphasis added.) 43 Fed.Reg. at 10587-90 (1978).

In the policy statement, the Railroad Administration specifically addressed the applicability of 13 separate categories of OSHA regulations. Defendant cites the following passage from the Railroad Administration's discussion of OSHA's "walking-working surfaces" regulations as proof that the Railroad Administration intended to displace OSHA from regulation of all working conditions on railroad bridges:

> "OSHA regulations concerning working surfaces deal with such matters as ladders, stairways, platforms, scaffolds and floor openings. Generally, these regulations are applicable in railroad offices, shops and other fixed work places. There are three principal exceptions to the rule.***
>
> ***
>
> Third, the OSHA regulations would not apply to ladders, platforms, and other surfaces on signal masts, catenary systems, railroad bridges, turntables, and similar structures or to walkways beside the tracks in yards or along the right-of-way. These are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety." (43 Fed.Reg. 10587 (1978).)

The OSHA regulations referred to in the above passage require the use of railings, toeboards and hole covers to be placed over or around an opening in a floor or wall surface. (See 29 C.F.R. §1910.23 (1991).) Based on the policy statement, these OSHA regulations are not applicable to railroad bridges. *Velasquez*, 734 F.2d at 218.

However, as noted above, the fall-protection regulations at issue in this case are included in OSHA's construction industry regulations. The Railroad Administration addressed separately the applicability of OSHA construction regulations. It is unclear from this section of the policy statement whether the Railroad Administration intended to displace OSHA fall-protection regulations. Specifically, the Railroad Administration stated:

> "To the extent that hazardous construction working conditions do not fall within [the Railroad Administration's] exercise of authority relating to the safety of railroad operations, the OSHA standards apply according to their terms in the railroad industry." (43 Fed.Reg. 10589 (1978).)

This section is ambiguous in that it is not clear which "hazardous construction working conditions" are within the Railroad Administration's exercise of exclusive authority.

When construing an administrative regulation, "'a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. ***[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" (*Udall v. Tallman* (1965), 380 U.S. 1, 16-17, 13 L.Ed.2d 616, 625, 85 S.Ct. 792, 801, quoting *Bowles v. Seminole Rock & Sand Co.* (1945), 325 U.S. 410, 413-14, 89 L.Ed. 1700, 1702, 65 S.Ct. 1215, 1217.) With this principle in mind, it is significant to note that the Railroad Administration does not interpret its policy statement as preempting OSHA from enforcing the fall-protection regulations on railroad bridges.

In 1991, the Railroad Administration issued a notice of proposed rulemaking in which the agency announced its intent to promulgate fall-protection regulations substantially similar to the OSHA regulations at issue here. (See 56 Fed.Reg. 3434 (proposed Jan. 30, 1991).) In the jurisdictional background section of the 1991 notice, the Railroad Administration quoted the "walking-working surface" section of the policy statement and stated:

> "[The Railroad Administration] intended to displace OSHA regulations with respect to the surfaces on bridges, *i.e.*, track structures, but *did not intend to prevent OSHA from exercising its more general responsibilities for the safety of railroad workers with respect to fall protection and respiratory equipment."* (Emphasis added.) (56 Fed.Reg. 3435 (proposed Jan. 30, 1991).)

This interpretation of the policy statement indicates that the Railroad Administration itself believes OSHA had jurisdiction over the working conditions at issue in this case. Because we are construing a Railroad Administration regulation, this interpretation is controlling "'unless it is plainly erroneous or inconsistent with the regulation.'" *Udall*, 380 U.S. at 16-17, 13 L.Ed.2d at 625, 85 S.Ct. at 801, quoting *Bowles*, 325 U.S. at 414, 89 L.Ed.2d at 1702, 65 S.Ct. at 1217.

Defendant contends that the above-quoted Railroad Administration interpretation of the policy statement is not controlling because it is inconsistent with the clear language of the 1978 policy statement. Defendant argues that the Railroad Administration's 1991 interpretation provides nothing more than an attempt to retroactively revise the Railroad Administration's prior statement. It is clear, as defendant points out, that the 1978

policy statement intended to displace OSHA regulations from "railroad operations." What is unclear, however, is whether the use of safety nets and other fall-protection devices on railroad bridges impacts upon "railroad operations." We note that the policy statement is sufficiently ambiguous to support either interpretation. Indeed, the Railroad Administration recognized such ambiguity when it stated:

> "[T]o the extent matters addressed by the OSHA regulations are connected with or relate to railroad operations and may interact with or create operational hazards, it may be necessary for [the Railroad Administration] and OSHA to consult concerning the interpretation or modification of such standards. As the primary regulatory agency concerned with railroad safety, [the Railroad Administration] will not hesitate to adopt its own standards to assure a safe environment for railroad operations and to promote regulatory consistency." (43 Fed.Reg. 10587 (1978).)

Moreover, the policy statement was a statement of general principle, rather than a definitive declaration. 43 Fed.Reg. 10587 (1978).

The Railroad Administration addressed this ambiguity again in the 1991 notice of proposed rulemaking when it stated:

> "[T]hese distinctions [between bridge surfaces and fall protection] have proved confusing to the regulated community, railroad employees, inspectors, and ***adjudicatory bodies. [The Railroad Administration] has recently received a number of legal memoranda addressing these issues from railroads and railroad associations: all of these evidence this confusion." (56 Fed.Reg. at 3435 (proposed Jan. 30, 1991).)

In fact, defendant is one of the railroads referred to by the Railroad Administration as having submitted legal memoranda. 56 Fed.Reg. at 3436 (proposed Jan. 30, 1991).

Based on the above excerpts from both the 1978 and the 1991 Railroad Administration pronouncements, we are unable to conclude that the Railroad Administration has unambiguously preempted OSHA from regulating the use of fall-protection equipment on railroad bridges. As the policy statement is subject to two competing interpretations which are equally reasonable, we believe the most appropriate interpretation is that which the Railroad Administration itself has adopted. Therefore, we hold that the OSHA fall-protection regulations applied to the present case.

We note that the *Velasquez* decision on which defendant and the appellate court relied is distinguishable. In *Velasquez*, the plaintiff fell through an opening in the track on a railroad bridge and landed on a creek bed *nine feet* below. The plaintiff in that case introduced evidence that "under OSHA regulations, rope barricades and a toeboard around the perimeter of the opening would have been appropriate measures." (*Velasquez*, 734 F.2d at 218.) From these facts it is clear that the plaintiff in *Velasquez* attempted to introduce evidence of OSHA "walking-working surface" regulations. The OSHA safety-net regulations did not apply because the plaintiff in *Velasquez* was substantially below the 25-foot threshold level at which a safety net is required.

In *dicta*, the *Velasquez* court noted that OSHA's construction regulations did not apply because the policy statement displaced those regulations for construction work done on railroad bridges.

(*Velasquez*, 734 F.2d at 218 n.1.) However, at the time of its decision, the *Velasquez* court did not have the benefit of the Railroad Administration's 1991 interpretation of the policy statement. Because the Railroad Administration's 1991 notice of proposed rulemaking contains an interpretation which is not plainly erroneous, we will follow the Railroad Administration's interpretation rather than that of the *Velasquez* court. (*Udall*, 380 U.S. at 16-17, 13 L.Ed.2d at 625, 85 S.Ct. at 801.) In light of the Railroad Administration's 1991 interpretation of its own regulations, and the fact that Velasquez is distinguishable, we need not consider the question of whether Illinois courts are bound to follow the decisions of lower Federal courts when interpreting Federal law

We are also aware that in 1988, Congress passed the Rail Safety Improvement Act of 1988, which requires the Railroad Administration to promulgate regulations "for the safety of maintenance-of-way employees, including standards for bridge safety equipment, such as nets, walkways, handrails, and safety lines." (45 U.S.C. §431(n) (1988).) Defendant argues that this provision indicates that Congress believed that the Railroad Administration is the most appropriate agency to regulate employee safety on railroad bridges. Clearly, when the Railroad Administration issues its final regulations on this matter or indicates that the working condition should go unregulated, OSHA will be displaced from enforcing its corresponding regulations. However, the 1988 statute does not answer the question of whether, in 1984, the Railroad Administration had already made such a determination relative to this working condition. Moreover, we do not believe Congress intended this statute to displace OSHA regulations which would otherwise apply.

Therefore, we find the Rail Safety Improvement Act of 1988 does not resolve the dispute in this case.

For the foregoing reasons, we reverse the judgment of the appellate court and remand to that court for consideration of the remaining issues raised by defendant's appeal.

Reversed and remanded.

JUSTICE BILANDIC, dissenting:

I respectfully dissent because, in my opinion, under the facts of this case, the Federal Railroad Administration (Railroad Administration) has preempted the application of the Federal Occupational Safety and Health Administration (OSHA) "fall-protection" regulations.

As the majority correctly notes, the Railroad Administration is the primary agency responsible for regulating the railroad industry. Congress enacted the Federal Railroad Safety Act of 1970 (45 U.S.C. §421 *et seq.* (1970)) for the purpose of providing "comprehensive and uniform safety regulations in all areas of railroad operations." (*Chicago Transit Authority v. Flohr* (7th Cir. 1977), 570 F.2d 1305, 1308.) Under that act, the Railroad Administration is expressly given the authority and responsibility to prescribe all rules, regulations and standards necessary for promoting safety in all areas of railroad operations. 45 U.S.C. §431 (1970).

The "fall-protection" regulations at issue here were enacted by OSHA. It is undisputed that OSHA is *not* the agency primarily responsible for regulating safety concerns within the

railroad industry. Instead, OSHA, pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 *et seq.* (1970)), has general authority to regulate working conditions that affect the occupational safety and health of employees in general, regardless of the industry in which they are employed. Thus, under the Federal regulatory scheme established by Congress, OSHA has generic authority to promulgate safety standards for industries affecting interstate commerce while the Railroad Administration has specific authority to promulgate safety standards for the railroad industry.

Obviously, this scheme created the potential for dual regulation by both the Railroad Administration and OSHA with respect to health and safety concerns in the railroad industry. Congress expressly acknowledged this potential problem and made provisions to avoid such overlapping regulation. Section 4(b)(1) of the Occupational Safety and Health Act states that its terms *will not apply* to working conditions as to which another Federal agency "exercise[s] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." (29 U.S.C. §653(b)(1) (1988).) Thus, by the very terms of the Occupational Safety and Health Act, OSHA regulations such as the "fall-protection" regulations at issue here are preempted when another Federal agency, such as the Railroad Administration, exercises statutory authority over a particular working condition.

In 1978, the Railroad Administration issued a policy statement in which it clearly and unequivocally stated its intent to exercise its statutory authority over "the safety of railroad operations." (43 Fed.Reg. 10589 (1978).) In that statement, the

Railroad Administration thoroughly condemned "piecemeal regulation of individual hazards in [railroad operations] by any other agency of government," calling such a practice "disruptive and contrary to the public interest." 43 Fed.Reg. 10586 (1978).

To avoid such piecemeal regulation, the Railroad Administration's policy statement specifically indicated over which railroad working conditions it was exercising its authority and thereby displacing any OSHA regulations that might otherwise apply. Among those aspects of the railroad industry over which the Railroad Administration asserted its authority was the precise working condition at issue in this case, that is, working conditions on railroad bridges. The 1978 policy statement provided, *inter alia*, that "OSHA regulations would not apply to ladders, platforms and other surfaces on *** railroad bridges." (43 Fed.Reg. 10587 (1978).) The Railroad Administration stated that it was asserting exclusive jurisdiction over this aspect of the industry because "[t}hese are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety." 43 Fed.Reg. 10587 (1978).

The majority concedes that this policy statement was sufficient to preempt OSHA's jurisdiction over some aspects of the railroad industry. (151 Ill.2d at 332.) However, the majority concludes that the policy statement is "ambiguous" as to whether the OSHA "fall-protection" regulations are displaced. In my view, the majority ignores the clear language of the policy statement.

At the core of the majority's finding of ambiguity is the fact that the "fall-protection" regulations are included as part of OSHA's "construction industry regulations." The majority notes that the 1978 policy statement separately addressed the applicability of the OSHA "construction industry regulations," stating:

> "'To the extent that hazardous construction working conditions do not fall within [the Railroad Administration's] exercise of authority relating to the safety of railroad operations, the OSHA standards apply according to their terms in the railroad industry.'" (151 Ill.2d at 300, quoting 43 Fed.Reg. 10589 (1978).)

The majority determines that this section makes the 1978 policy statement ambiguous because "it is not clear which 'hazardous construction working conditions' are within the Railroad Administration's exercise of exclusive authority." (151 Ill.2d at 330-31.) I believe that the majority's conclusion that the 1978 policy statement is ambiguous is patently erroneous.

The 1978 policy statement clearly mandates that OSHA's "construction industry regulations" apply to a particular working condition in the railroad industry *only if* the Railroad Administration has not exercised its authority over that condition. In this case, the Railroad Administration *has* in fact exercised its exclusive authority over the hazardous working condition at issue. The 1978 policy statement clearly states that the Railroad Administration is exercising its authority, to the exclusion of OSHA, over working conditions on *railroad bridges*. Thus, working conditions on railroad bridges clearly constitute a "hazardous construction working condition" over which the Railroad Administration has exercised its authority and displaced

the authority of OSHA. The OSHA "construction industry regulations," including the "fall-protection" regulations, are therefore inapplicable to working conditions on railroad bridges. There is no ambiguity on this point; the policy statement specifically preempts OSHA from regulating work on railroad bridges.

Because the policy statement unambiguously places the regulation of safety and health concerns of workers on railroad bridges exclusively within the province of the Railroad Administration, it must be applied according to its terms. There is no justification for looking to outside sources to discern the meaning of an unambiguous statement. (2A N. Singer, Sutherland on Statutory Construction §46.04 (5th Ed. 1992).) The majority ignores this principle and looks to extrinsic sources to "interpret" the 1978 policy statement. Moreover, the outside source upon which the majority ultimately relies is not persuasive. The majority seeks to discern the intent behind the 1978 statement by looking to language contained in the preamble to a "notice of proposed rulemaking" issued by the Railroad Administration in *1991*. Initially, I must seriously question the usefulness of an "interpretation" that is issued *13* years *after* the document it purports to interpret. (See *Colt Industries, Inc. v. United States* (D.C. Cir. 1989), 880 F.2d 1311, 1313.) An administrative interpretation is not entitled to controlling weight when the interpretation is not relatively contemporaneous with the statement being interpreted. (2B N. Singer, Sutherland on Statutory Construction §49.08 (5th Ed. 1992); see also *Drew v. Lawrimore* (D.C. S.C. 1966), 257 F.Supp. 659, 669-70.) I agree with the defendant that the Railroad Administration's 1991 "interpretation" constitutes nothing more than an attempt to retroactively revise

their prior statement. Such "retroactive history" is worthy of little or no weight. (See *Colt Industries*, 880 F.2d at 1313 (*subsequent* legislative history is entitled to little weight).) Moreover, I would point out that the 1991 "interpretation" was issued over seven years after the plaintiff's accident and over one year after the trial in this cause was completed.

Even more importantly, the 1991 "interpretation" is contrary to the clear mandate of the Railroad Administration's 1978 policy statement regarding OSHA's authority over railroad bridges. The plain language of the 1978 statement preempts OSHA's jurisdiction over working conditions on railroad bridges. The 1991 "interpretation" is in direct contravention of that mandate. As the majority notes, an administrative interpretation of a regulation is not controlling where it is inconsistent with the plain language of the regulation itself. (151 Ill.2d at 332.) Thus, the 1991 "interpretation" of the 1978 policy statement is both untimely and directly contradicted by the plain language of the statement itself. Such an "interpretation" should not be accorded any significance by this court.

In addition to being in violation of basic rules of construction, the majority's holding is in error because it creates the exact problem the Railroad Administration sought to avoid when it issued the 1978 policy statement, namely, overlapping regulation of the same occupational hazard by two governmental agencies. That this is the result is easily illustrated. According to the majority, the 1978 policy statement *did* preempt OSHA's "walking-working surfaces" regulations, but did *not* preempt OSHA's "fall-protection" regulations. It is quite evident,

however, that these two sets of regulations are aimed at the same occupational hazard.

OSHA's "walking-working surfaces" regulations require the use of railings, toeboards and hole covers over and around floor openings. According to the majority, then, the Railroad Administration has the sole authority to determine whether *these* safety devices are needed on railroad bridges. OSHA's "fall-protection" regulations require, for workplaces situated more than 25 feet above the ground, the use of safety nets or other devices intended to prevent workers from falling. The majority thus concludes that the Railroad Administration does not have the sole authority to determine whether *these* safety devices are needed on railroad bridges. Rather, OSHA has the authority to determine the necessity of such safety devices.

It cannot be disputed that railings, toeboards and hole covers over and around floor openings, and safety nets underneath a floor opening, are aimed at protecting workers from the same hazard, namely, that of *falling*. Thus, according to the majority, the Railroad Administration *intended* that the *same* working hazard be regulated by two separate agencies, OSHA and the Railroad Administration. This result directly conflicts with the Railroad Administration's express condemnation of "piecemeal regulation of individual hazards" by more than one governmental agency. (43 Fed.Reg. 10586 (1978).) This result is also illogical. There is no rational reason for the Railroad Administration to distinguish between the "walking-working surfaces" regulations and the "fall-protection" regulations, as they pertain to railroad bridges. To say that the Railroad Administration believed that the use of *railings and holecovers* on

railroad bridges was "so much a part of the [railroad] operating environment" (43 Fed.Reg. 10587 (1978)) that they must be regulated by the Railroad Administration, but that the use of *safety nets* on railroad bridges is not, is absurd. Clearly, the Railroad Administration did not intend such an illogical result. The majority's decision, however, results in just that—piecemeal regulation of a single hazard by two separate agencies.

The majority's decision is also in conflict with clear Federal precedent on this precise issue. *Velasquez v. Southern Pacific Transportation Co.* (5th Cir. 1984), 734 F.2d 216, is materially indistinguishable from the instant case. In *Velasquez*, the plaintiff, a railroad worker participating in repair work on a railroad bridge, fell through an opening in the bridge which the workers had created so that they could reach the area underneath the track. The plaintiff filed an action under FELA against his railroad-employer. At trial, the plaintiff's expert was allowed to testify that OSHA regulations applied to the defendant railroad and that, under OSHA, rope barricades and toeboards around the opening would have been appropriate. The judgment entered in the plaintiff's favor was subsequently reversed by the Fifth Circuit Court of Appeals, which held that the reference to the OSHA regulations was reversible error. *Velasquez*, 734 F.2d at 218.

The *Velasquez* court determined that the admission of the OSHA regulations was improper because the Railroad Administration specifically preempted those regulations in the 1978 policy statement. The Court of Appeals noted that the policy statement clearly provided that OSHA regulations would not apply to railroad bridges. The court determined that the

Railroad Administration's assertion of jurisdiction over railroad bridges in the 1978 statement clearly preempted and displaced *both* the OSHA regulations requiring rope barricades and toeboards, *and* the OSHA "construction regulations." (*Velasquez*, 734 F.2d at 218.) Thus, *Velasquez* is clear precedent for the proposition that the OSHA "fall-protection" regulations were displaced by the 1978 policy statement. This court, when addressing a *federally created* cause of action, such as FELA, should accord, if not controlling weight, at least great deference to the decisions of lower Federal courts. See *Bowman v. Illinois Central R.R. Co.* (1957), 11 Ill.2d 186, 199-200.

I disagree with the majority's attempt to distinguish *Velasquez*. First, the majority asserts that *Velasquez* is distinguishable because the plaintiff in that case introduced only evidence of OSHA's "walking-working surfaces" regulations and *not* the "fall-protection" regulations at issue in this case. (151 Ill.2d at 333-34.) However, this distinction is without merit because the *Velasquez* court specifically held that OSHA's "construction regulations" were preempted by the 1978 policy statement. (*Velasquez*, 734 F.2d at 218.) Moreover, as I discussed previously, no reasoned basis for distinguishing between the "walking-working surfaces" regulations and the "fall-protection" regulations can be advanced in this case.

The majority also attempts to distinguish *Velasquez* on the ground that that court did not have the "benefit" of the Railroad Administration's 1991 "interpretation" of the 1978 statement. (151 Ill.2d at 334.) As noted, that "interpretation" is entitled to little or no weight because it conflicts with the express terms of the statement which it purports to interpret. Thus, neither of the

arguments proffered by the majority provide a legitimate basis for distinguishing *Velasquez*.

In conclusion, I believe that the interpretation of the 1978 Railroad Administration policy statement applied by the majority is clearly erroneous. I would uphold the judgment of the appellate court holding that the 1978 statement preempted the OSHA "fall-protection" regulations in this case and that the admission of those regulations at trial constituted reversible error. For these reasons, I dissent.

JUSTICE HEIPLE joins in this dissent.

APPENDIX B

ILLINOIS SUPREME COURT
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November 30, 1992

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No. 71783 - Tracy Templeton, appellant, v. Chicago and Northwestern Transportation Company, appellee. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 10, 1992.

APPENDIX C

APPELLATE COURT OF ILLINOIS
First District, Fifth Division

No. 1-90-0312
March 15, 1991

TRACY TEMPLETON, Plaintiff-Appellee,
v.
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, Defendant-Appellant.

JUSTICE MURRAY delivered the opinion of the court:

The plaintiff, Tracy Templeton (Templeton), was an employee of the defendant, Chicago and North Western Transportation Company (North Western). On January 27, 1984, Templeton was severely injured when he fell 31 feet through an opening in the deck of a railroad bridge to the ice below. At the time he was injured, Templeton was working on North Western's bridge spanning the Illinois River near Pekin, Illinois. Templeton brought a negligence action pursuant to the Federal Employers' Liability Act (FELA), (45 U.S.C. §51 *et seq.* (1988)) in which plaintiff alleged that he was injured as a result of the negligence of North Western. A trial by jury resulted in a verdict for the plaintiff in the amount of $3.5 million after a reduction for the jury's finding that the plaintiff was 14% contributorily negligent. North Western appeals from the final judgment entered on the verdict.

Templeton was 27 years of age at the time of his accident on January 27, 1984. He began employment with North Western in

1980. He worked both as a painter and a carpenter on the Bridge and Building (B&B) crew. The B&B department was responsible for the construction and maintenance of bridges.

The redecking project to which Templeton was assigned in October 1983 required the B&B crew to replace all of the ties on the Illinois River bridge in successive 40-foot sections. By January 27, 1984, the date of Templeton's accident, the redecking had been completed, and the B&B crew was working on a fixed surface. However, the railroad track still had to be realigned in order to permit trains to again travel over the bridge at nominal operating speeds. Track realignment required access to the underside of the bridge, which was accomplished by temporarily removing individual sections of the walkway grating. Realignment work was being performed throughout the week of Templeton's accident.

Templeton's accident occurred on the bridge surface at about 10 a.m. He was assigned to remove bolts called "double grips" with an air impact wrench. Meanwhile, other employees removed a single, 30 foot by 15 inch section of walkway grating so that a scaffold could be lowered through the opening they had created. Once the scaffold was in place, another employee would use it as a platform underneath the bridge to assist in retightening bolts which anchored the track to the ties.

The narrow opening in the bridge deck was not barricaded while the employees raised the scaffold. Templeton was not wearing a safety line at the time of his accident. North Western's safety policy did not require a restraining device to be used in all facets of bridge work.

At the time of the accident, Templeton was continuing to remove "double grips" on the west side of the bridge. His air impact wrench was connected to an air compressor by a hose approximately 100 feet long. His foreman thought Templeton was getting too far ahead of the rest of the crew and called him back. As Templeton started to walk back toward the rest of the crew, the hose on the air impact wrench hung up on one of the "double grips."

No one knows exactly what happened next. No one saw what caused Templeton to fall. North Western alleges the last time anyone saw Templeton, he was moving south, but looking north, about five or six feet north of the narrow opening in the walkway. Templeton alleges the first notice any of the co-workers had of the fall was a scream at which time they each looked around and saw the plaintiff falling through the opening in the deck with his hand slightly lower than his feet and the air impact wrench still in his hands.

Templeton had no recollection of the events of the occurrence and could not say what happened or why or how he fell. A co-worker testified that he saw the plaintiff bounce off the ice below, slide ten feet, then try unsuccessfully to get up. In any event, Templeton landed on the ground adjacent to the river and some 31 feet below the bridge. He was taken to the hospital by an emergency rescue squad. Templeton has suffered severe physical injuries as a result of his fall. The testimony conflicts as to the extent of brain damage, if any, sustained by Templeton.

North Western raises the following issues on appeal: (1) whether the trial court erred in permitting plaintiff to

introduce evidence that North Western allegedly failed to comply with Occupational Safety and Health Administration (OSHA) regulations; (2) whether the trial court erred in instructing the jury that such an alleged violation could be considered as evidence of railroad negligence; (3) whether the trial court erred in permitting plaintiff to introduce evidence of previous employee accidents on other North Western bridges; (4) whether the trial court erred in not ordering a new trial when it learned that the jury surreptitiously brought extrinsic evidence into jury deliberations; and (5) whether the size of the verdict was excessive.

In its most decisive among the five alleged errors, North Western argues that the trial court erred in instructing the jury that a violation of an OSHA regulation could be considered as proof of North Western's negligence. OSHA regulations are statutorily created working conditions based on the federally enacted Occupational Safety and Health Act of 1970. (OSH Act.) (29 U.S.C. §651 *et seq.* (1970)). It is North Western's contention that OSHA is inapplicable to a railroad employee such as Templeton.

Railroad workers do occupy a somewhat different status than the average American worker whether he is a fireman, oiler, engineer or whatever. The rights and responsibilities of the railroad worker injured during his employment are basically determined by the FELA (45 U.S.C. §51, *et seq.* (1908)) and Federal decisions construing that act. (*Norfolk & Western Ry. Co. v. Liepelt* (1980), 444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755.) The FELA allows suits involving injuries to railroad men

to be filed in either State or Federal courts. 45 U.S.C. §56 (1948).

At trial testimony was introduced that certain safety standards, including OSHA standards, required nets or safety belts whenever a worker was working higher than 25 feet above ground. The trial court also gave the jury an instruction embodying the OSHA catch net regulation.

The nub of North Western's argument concerns the testimony of the absence of a safety net and safety belt and the judge's instruction that the jury could consider OSHA regulations in its consideration of the issue of North Western's negligence.

In 1970 Congress enacted the Federal Railroad Safety Act (FRSA). (45 U.S.C. §421 *et seq.* (1970)). The FRSA contemplated a comprehensive and uniform set of safety regulations in all areas of railroad operations. (*Chicago Transit Authority v. Flohr* (7th Cir. 1977), 570 F.2d 1305.) The United States Secretary of Transportation is charged with the duty to prescribe all necessary rules, regulations ordered and standards for all areas of railroad safety. (45 U.S.C. §431 (1970).) The Secretary of Transportation has delegated these responsibilities to the Administrator of the Federal Railroad Administration (FRA), a unit of the Department of Transportation. (49 C.F.R. §1.49(m) (1988).) Further, North Western argues that the FRA has exclusive jurisdiction over working conditions pertaining to railroad bridges and the issue of whether or not safety nets and safety belts are required in bridge redecking work.

North Western contends that the FRSA and not OSHA controls the safety standards applicable to the work Templeton was engaged in, *i.e.*, "redecking of the bridge's railway bed."

Plaintiff asserted that North Western had been negligent in violating regulations promulgated by OSHA. Plaintiff argues that the OSHA requirements of nets and safety belts are not preempted by the FRSA. The basis of this argument is that OSHA regulations are only preempted by the FRSA when there is an exercise of authority over the same working conditions regulated by OSHA.

The real legal issue in respect to safety regulations was whether the FRA actually exercised its jurisdiction over the railroad deck work, and if not, does the FRSA preclude the application of OSHA safety rules as evidence of a railroad's negligence in this case.

In this case, at the time of Templeton's injury, January 1984, there was no clear cut FRA regulation requiring nets or safety belts to be provided for workers on railroad bridges. In his 74-page brief plus appendix the plaintiff points to none. Alternatively, North Western points to numerous sections of the Federal Register indicating that no regulations requiring nets and/or safety belts were ever adopted by the FRA. Finally, the fact that there was no such a requirement is disclosed in a proposed notice of rule published in the Federal Register by the FRA (56 Fed.Reg. 3434-41 (1991)) and brought to this court's attention just prior to oral argument. Although the plaintiff has emphasized certain portions of the notice by underlining proposed

safety rules for railroads, counsel failed to note the following, also contained in the notice:

> "43 FR 10585 Both courts and the Occupation Safety and Health Review Commission have held that the assertion of authority in a policy statement constitutes an exercise of FRA's statutory authority under the rail safety laws sufficient to displace OSHA standards pursuant to section 4(b)(1) of the OSH Act with respect to health and safety issues intrinsic to 'railroad operation.' *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216, 218 (5th Cir. 1984); *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977); *Consolidated Rail Corp.*, 10 OSHC (BNA) 1577 (1982)." 56 Fed.Reg. 3434, 3435 (1991).

In 1978 the FRA issued a statement to the effect that OSHA regulations would not apply to, among other aspects of the railroad industry, "railroad bridges." (43 Fed.Reg. 10587 (1978).) The railroad industry points to this declaration as indicative of the vesting of exclusive jurisdiction over railroad bridges in the FRA.

Finally, North Western points to a 1988 amendment to the FRSA in which it was specifically stated, "[t]he Secretary shall within one year after June 22, 1988, issue such rules, regulation orders and standards as may be necessary for the safety of maintenance-of-way employees, including standards for bridge safety equipment, such as nets, walkways, handrails and safety lines, ***." (45 U.S.C. §431(n) (1988).) This court could find no Federal case where a Federal court interpreted the FRSA as having either directly or inferentially held that the FRA did not intend to preempt OSHA regulations. North Western has cited a

number of cases to the contrary. They are cited in the notice published by the FRA referred to above.

Preemption is viewed somewhat differently when applied to the question of preemption of State regulations by a Federal statute. That assumption is that historical police powers of a state are not superseded by a Federal act unless that is the clear intention of congress. (*Ray v. Atlantic Richfield Co.* (1978), 435 U.S. 151, 55 L.Ed.2d 179, 98 S.Ct. 988.) Where a particular area is not totally foreclosed to the State, the State may regulate in certain situations. In the FRSA, congress made explicit declaration that no State rail safety regulations shall remain valid after the promulgation of a Federal regulation covering the same subject matter as that covered by the State law. (45 U.S.C. §434 (1970).) In *Liepelt v. Norfolk & Western Ry. Co.* (1978), 62 Ill.App.3d 653, 378 N.E.2d 1232, *rev'd on other grounds*, (1980), 444 U.S. 490, 62 L.Ed.2d. 689, 100 S.Ct. 755, the trial court held that the Federal act did not preempt an Indiana safety statute relating to railroads. We note, however, that the *Liepelt* court only considered the narrow issue of whether the Indiana Switch Light Act and Standard covered the same subject matter. *Liepelt*, 62 Ill.App.3d at 660, 378 N.E.2d at 1239.

The able trial judge was obviously attempting to follow Illinois law on the subject. Yet, both the trial court and this court are compelled to follow Federal decisions in determining rights and obligations created by laws enacted by the U.S. congress. *Bowman v. Illinois Central R.R. Co.* (1957), 11 Ill.2d 186, 142 N.E.2d 104.

North Western cites the case of *Velasquez v. Southern Pacific Transportation Co.* (5th Cir. 1984), 734 F.2d 216, in support of their proposition. The *Velasquez* case involved a railroad worker who was injured while working on a railroad bridge. The railroad workers had to remove a portion of the wooden walkway along the track so they could reach the area underneath the track. Velasquez slipped and fell through this opening, landing on the creek bed nine feet below. Templeton also involved a railroad worker injured in a fall. Templeton's attorneys made a valiant attempt to distinguish his case from the *Velasquez* case; however, *Velasquez* is precedent for the proposition that the trial court erred in admitting evidence of OSHA violations and instructing the jury they could consider such evidence on the issue of railroad negligence. *Velasquez v. Southern Pacific Pacific Transportation Co.* (5th Cir. 1984), 734 F.2d 216.

In *Velasquez* the court held that a policy statement constituted a sufficient exercise of statutory authority delegated to the FRA to displace OSHA standards. Templeton attempts to distinguish his situation from that of Velasquez by arguing that the accident in this case occurred when Templeton fell 31 feet off a bridge whereas Velasquez was working replacing a large beam supporting the track when he slipped and fell through the opening. The *Velasquez* court plainly and clearly held that an instruction to the effect that the jury could consider an OSHA violation on the issue of a railroad's negligence was reversible error. The court plainly stated, "We agree with Southern Pacific's argument that OSHA standards do not apply to the walkway along the tracks, or railroad bridges because they have

been displaced by a Federal Railroad Administration (FRA) policy statement." *Velasquez*, 734 F.2d at 218.

The issue of whether or not the admission of the evidence concerning violations was harmless was not addressed in *Velasquez*. We do not address it here. It may well be that such evidence is admissible under a different theory, *i.e.*, failure to provide a safe work place.

In *Missouri Pacific R.R. Co. v. Railroad Comm'n of Texas* (5th Cir. 1987), 833 F.2d 570, the court considered the question of whether the introduction of evidence of violations of certain State safety regulations was preempted by the FRSA policy statement. The court found, "[t]o hold as *Velasquez* did, that the FRSA policy statement prevented plaintiff from securing an instruction on OSHA regulations, does not control the issue of the exercise of FRA jurisdiction to the exclusion of state regulations." *Missouri Pacific R.R. Co. v. Railroad Comm'n of Texas* (5th Cir. 1987), 833 F.2d at 576 n.6.

Templeton also argues that the introduction of evidence concerning the OSHA violation and the instruction was at best harmless. Yet as the *Velasquez* court indicates, the error created "'a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations'" and required a reversal. *Velasquez v. Southern Pacific Transportation Co.* (5th Cir. 1984), 734 F.2d at 219 quoting *Miller v. Universal City Studios, Inc.* (5th Cir. 1981), 650 F.2d 1365, 1372.

We believe the trial judge attempted to follow the spirit of both State and Federal law, yet we are compelled to follow the

aforecited Federal cases. We reverse and remand the matter for a new trial based on the narrow issue of the erroneous instructions. In light of our conclusion we do not reach the other issues raised by the parties.

REVERSED AND REMANDED.

LORENZ, P.J., and McNULTY, J., concur.

APPENDIX D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Judge Paddy H. McNamara

No. 85 L 28835
October 26, 1989

TRACY TEMPLETON, Plaintiff,
v.
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, Defendant.

"We, the jury, find for the plaintiff and against the defendant and further find the following:"

First without taking into consideration the question of reduction of damages due to the negligence of the plaintiff, if any, or failure to mitigate damages, suffered by the plaintiff as a proximate result of the occurrence in question is $4,069,768.00 itemized as follows:

The disability & disfigurement resulting from the injuries	$1,500,000.00.
The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries . . .	$1,899,028.00.

The present cash value of the reasonable expenses of medical care, treatment & services reasonably certain to be received in the future	$5,740.00.
The value of earnings lost and the present cash value of the earnings reasonably certain to be lost in the future	$665,000.00
Total	$4,069,768.00

Second: Assuming that 100% represents the total combined negligence of the plaintiff & of the defendant we find that the percentage of negligence that was a proximate cause of plaintiff's injury attributable solely to the plaintiff is 14 percent (%).

Third: After reducing the total damages sustained by the plaintiff by the percentage of negligence attributable to the plaintiff, we assess plaintiff's recoverable damages before consideration of mitigation in the sum of $3,500,000.00.

Fourth: We find that plaintiff has failed to mitigate his damages in the amount of $-0-.

Fifth: Plaintiff's total recoverable damages after all reductions are $3,500,000.00.

Ordered judgment for plaintiff in the amount of $3,500,000.00 and against the defendant on verdict.

APPENDIX E

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 85 L 28835
January 8, 1990

TRACY TEMPLETON, Plaintiff,
v.
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, Defendant.

ORDER

This matter coming on for post-trial motions, argument having been heard and recorded,

It is hereby ordered that both plaintiff's and defendant's post-trial motions are denied.

JUDGE PADDY H. McNAMARA
January 8, 1990
Circuit Court - 236

APPENDIX F

Article VI(2), United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment 14, United States Constitution:

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*:

> 45 U.S.C. §51 (1908) provides in pertinent part:
>
> "Every common carrier by railroad...shall be liable in damages to any person suffering injury while he is employed by such carrier...for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier...."
>
> 45 U.S.C. §53 (1908) provides in pertinent part:
>
> "In all actions...brought against any such common carrier by railroad...to recover damages for personal injuries to an employee...the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee...."

The Federal Railroad Safety Act, 45 U.S.C. §421, *et seq.*:

45 U.S.C. §431 (1970) provides in pertinent part:

"(a) The Secretary of Transportation (hereafter in this subchapter referred to as the "Secretary") shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970, and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety."

....

"(e) The Secretary shall issue initial railroad safety rules, regulations, orders, and standards under this subchapter based upon existing safety data and standards, not later than one year after October 16, 1970. The Secretary shall review and, after hearing in accordance with subsection (b) of this section, revise such rules, regulations, orders, and standards as necessary."

45 U.S.C. §431 (1988) provides in pertinent part:

"(n) Maintenance-of-way operations

The Secretary shall, within one year after June 22, 1988, issue such rules, regulations, orders, and standards as may be necessary for the safety of maintenance-of-way employees, including standards for bridge safety equipment, such as nets, walkways, handrails, and safety lines, and requirements relating to instances when boats shall be used."

The Occupational Safety and Health Act, 29 U.S.C. §651 *et seq.*:

29 U.S.C. §653 (1970) provides in pertinent part:

"(b)(1) Nothing in this chapter [Occupational Safety and Health Act] shall apply to working conditions of employees with respect to which other Federal

agencies, and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

....

"(b)(4) Nothing in this chapter shall be construed to supersede or in any manner affect any workman's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."

APPENDIX G

29 C.F.R. PART 1926 - SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

1926.104 — Safety belts, lifelines, and lanyards

(a) Lifelines, safety belts, and lanyards shall be used only for employee safeguarding. Any lifeline, safety belt, or lanyard actually subjected to in-service loading, as distinguished from static load testing, shall be immediately removed from service and shall not be used again for employee safeguarding.

(b) Lifelines shall be secured above the point of operation to an anchorage or structural member capable of supporting a minimum dead weight of 5,400 pounds.

(c) Lifelines used on rock-scaling operations, or in areas where the lifeline may be subjected to cutting or abrasion, shall be a minimum of ⅞-inch wire core manila rope. For all other lifeline applications, a minimum of ¾-inch manila or equivalent, with a minimum breaking strength of 5,400 pounds, shall be used.

(d) Safety belt lanyard shall be a minimum of ½-inch nylon, or equivalent, with a maximum length to provide for a fall of no greater than 6 feet. The rope shall have a nominal breaking strength of 5,400 pounds.

(e) All safety belt and lanyard hardware shall be drop forged or pressed steel, cadmium plated in accordance with type 1, Class B plating specified in Federal Specification QQ-P-6. Surface shall be smooth and free of sharp edges.

(f) All safety belt and lanyard hardware, except rivets, shall be capable of withstanding a tensile loading of 4,000 pounds without cracking, breaking, or taking a permanent deformation.

1926.105 — Safety nets

(a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

(b) Where safety net protection is required by this part, operations shall not be undertaken until the net is in place and has been tested.

(c) (1) Nets shall extend 8 feet beyond the edge of the work surface where employees are exposed and shall be installed as close under the work surface as practical but in no case more than 25 feet below such work surface. Nets shall be hung with sufficient clearance to prevent user's contact with the surfaces or structures below. Such clearances shall be determined by impact load testing.

(2) It is intended that only one level of nets be required for bridge construction.

(d) The mesh size of nets shall not exceed 6 inches by 6 inches. All new nets shall meet accepted performance standards of 17,500 foot-pounds minimum impact resistance as determined and certified by the manufacturers, and shall bear a label of proof test. Edge ropes shall provide a minimum breaking strength of 5,000 pounds.

(e) Forged steel safety hooks or shackles shall be used to fasten the net to its supports.

(f) Connections between net panels shall develop the full strength of the net.

APPENDIX H

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
[49 CFR Part 221]
[Docket No. ROS-1, Notice 3]

RAILROAD OCCUPATIONAL SAFETY AND HEALTH STANDARDS; TERMINATION

Policy Statement

AGENCY: Federal Railroad Administration, DOT.

ACTION: Termination of rulemaking proceeding and issuance of policy statement.

SUMMARY: The Federal Railroad Administration (FRA) is withdrawing its notice of proposed rulemaking with respect to railroad occupational safety and health standards. FRA had determined that it should not attempt to regulate at this time in an area already covered by regulations issued by the Department of Labor (Labor). This termination notice also explains the respective jurisdiction of FRA and Labor in a policy statement.

EFFECTIVE DATE: This termination is effective March 14, 1978.

. . .

SUPPLEMENTARY INFORMATION: On July 15, 1976, the Federal Railroad Administration (FRA) published a notice of proposed rulemaking (41 FR 29153) concerning the issuance of railroad occupational safety and health standards under the authority of the Federal Railroad Safety Act of 1970 (84 Stat. 971; 45 U.S.C. 421 et seq.). The specific standards proposed in that proceeding, designated as Docket No. ROS-1, concerned

means of egress from buildings and structures, general environmental controls and fire protection. The requirements of the proposed standards, corresponded generally to those contained in subparts E, J and L of the Occupational Safety and Health Standards (29 CFR Part 1910) issued by the Occupational Safety and Health Administration of the Department of Labor (OSHA/DOL). After reviewing the comments submitted to this Docket, and on reconsideration of the proper role for FRA in the general area of occupational safety and health, the FRA has determined that the proposed standards should not be issued and that the proceeding in Docket No. ROS-1 should be terminated. This document terminates the rulemaking proceeding and issues a policy statement concerning the relationship between the respective jurisdictions of FRA and OSHA.

. . .

While the OSH Act has created, for the Secretary of Labor, a broad, general authority to regulate working conditions that affect the occupational safety and health of employees, it also recognized the existence of similar authority in other Federal agencies. Section 4(b)(1) of the OSH Act provides that the OSH Act shall not apply to working conditions as to which another Federal agency exercises statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

The FRA has long been involved in and concerned with assuring that railroad employees, shippers and the general public are provided with safe transportation by rail. This involvement dates back to the late nineteenth century when FRA's predecessor agency, the Interstate Commerce Commission, was directed to enforce statutory provisions requiring the use of various safety

appliances on railroad cars and engines for the protection of employees and travelers (45 U.S.C. 1-7). ...

In order to further FRA's ability to respond effectively to the contemporary safety problems and hazards existing within the railroad industry, the Congress, in 1970, enacted the Federal Railroad Safety Act ("FRSA"). The FRSA authorized the Secretary of Transportation to exercise broad and general regulatory powers, as he deemed necessary, in all areas of railroad safety.

Given this longstanding FRA involvement in regulatory activities concerned with assuring both safe working conditions for railroad employees and safe rail transportation of persons and property, it was obvious that the working conditions of railroad employees were subject to potential dual regulation by the Secretary of Labor pursuant to his OSH Act authority. In order to effect the Congressional policy reflected in Section 4(b)(1) of the OSH Act, and thereby avoid unnecessary and inefficient duplication of Federal efforts in the area of railroad occupational safety and health, the FRA initiated a regulatory proceeding to develop specific FRA occupational safety and health standards which would preempt the Secretary of Labor from enforcing OSH Act standards applicable to the same working conditions. An advance notice of proposed rulemaking was published on March 7, 1975 (40 FR 10693) indicating FRA's intention to issue specific standards. A subsequent notice of proposed rulemaking published on July 15, 1976 (41 FR 29153) stated that FRA had decided to propose standards in three particular areas and to issue a comprehensive code of occupational safety and health standards specifically applicable to railroad employees. The applicability of

the standards which were to be included in this code was defined on a territorial basis rather than a specific hazard basis. The standards would apply to certain enumerated railroad workplaces, properties, facilities, structures, and equipment. Because of the complexity and magnitude of such an undertaking, it was anticipated that this code would be issued in an incremental fashion through several successive rulemaking proceedings. As with the initial specific three areas of regulation, the proposed FRA rules would be similar to those contained in several subparts of the OSHA standards.

Written comments in response to this proposal were received, and a public hearing was conducted. The FRA has reviewed not only these comments, but also the entire original concept as to the adoption of a comprehensive code of occupational safety and health standards for the railroad industry paralleling the existing OSHA regulations.

While the FRA is vested with broad authority in all areas of railroad safety, including those of an occupational nature, we believe it is important to determine the extent to which that authority can and should be exercised in order to assure an effective and coherent overall railroad safety program. To date, the majority of our efforts to assure continuing safety or to improve the present level of railroad safety has been concentrated in those areas of the railroad industry that are directly related to railroad operations—that is, the provision of a transportation service by rail. This is reflected throughout the existing FRA regulations which can be classified generally as those related to (1) track, roadbed, and associated devices and structures, (2) equipment and (3) human factors.

In these traditional areas of railroad safety, FRA has developed a special expertise which makes this agency uniquely qualified to play the primary role in the Federal Government's efforts to assure safe employment and places of employment for railroad employees engaged in activities related to railroad operations. ...

While the primary purpose of this notice is to inform all interested parties of the FRA's determination to terminate this rulemaking proceeding, the FRA believes that a more explicit discussion of the implications of this determination with respect to the existing jurisdictions of FRA and OSHA and the policy which will be utilized to guide future FRA actions in the occupational safety and health area is both necessary and in the public interest. It is hoped that this discussion will assist the courts and the Occupational Safety and Health Review Commission in understanding the extent to which FRA has exercised its statutory jurisdiction, the shape and organic nature of the FRA regulatory program, and the complementary role of OSHA in promoting safe and healthful working conditions for railroad employees.

POLICY CONCERNING EXERCISE OF STATUTORY AUTHORITY

A. INTRODUCTION

This policy statement will enumerate: (1) Those categories of working conditions and associated hazards with respect to which the agency is presently exercising its authority through the application of published standards or other mechanisms; (2) those working conditions and associated hazards with respect to which the agency has determined that regulation by FRA is not

appropriate at this time but which are so related to regulated conditions as to require close coordination with OSHA; and (3) other working conditions and associated hazards with respect to which FRA has no present plans to exercise jurisdiction. The purposes of this statement of policy are to assure the integrity of the regulatory program currently in place for the promotion of rail transportation safety by articulating its dimensions and to clarify the respective roles of FRA and OSHA in assuring the occupational safety and health of railroad employee.

. . .

As is reflected by the termination notice set forth above, FRA has decided to focus its resources and energies for the immediate future on the safety of railroad operations. As used herein, "railroad operations" refers to the movement of equipment over the rails. The term "safety" includes health-related aspects of railroad safety to the extent such considerations are integrally related to operational safety hazards or measures taken to abate such hazards. The term "safety of railroad operations," then, relates to the conditions and procedures necessary to achieve the safe movement of equipment over the rails. For instance, the safety of railroad operations requires that track forces engaged in laying or repairing welded rail observe certain procedures impacting on the final condition of the track and assure that geometric and other standards are met (see 49 CFR Part 213). Similarly, proper precautions to assure that trackmen are not struck by trains or other equipment moving over the rails are part of the safety of railroad operations. On the other hand, most hazards related to the handling of welding apparatus are non-operational concerns.

. . .

FRA regulation of railroad safety under statutes which FRA administers consists of numerous elements designed to promote the safe transportation of persons and property over the nation's railroads. Implicit in each major area of regulation is the three-fold objective of protecting passengers, persons along the right-of-way, and railroad employees. Protection of the public generally and employees in particular is, of necessity, an integrated undertaking. As a general rule, it is not possible to regulate an individual hazard without impacting on other, related working conditions, nor without impacting on the safe transportation of persons and property. Therefore, it is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on longstanding industry practices and pre-existing regulations.

. . .

There are, of course, some inherent dangers in the movement of any means of carriage (e.g., airplane, truck, barge, train). Enlightened regulation involves both a concerted effort to reduce risks and a recognition that, unless all commerce is to cease, certain risks can be guarded against only by the alertness and discipline of individuals. Both OSHA and FRA seek to assure workplaces are as safe as possible. To that end the Ninety-First Congress enacted both the OSH Act and the Federal Railroad Safety Act of 1970. Within the area of railroad operations, it is FRA which must decide what regulations are necessary and feasible.

B. EXERCISE OF FRA JURISDICTION OVER RAILROAD OPERATIONS

The overall FRA program to assure the safety of railroad operations may be generally subdivided into three fields: (1) Track, roadbed, and associated devices and structures, (2) equipment, and (3) human factors. FRA has now exercised its statutory authority with respect to each of these regulatory fields by actual rulemaking. While it is expected that additional regulatory initiatives may be undertaken, as necessary, in each of the major regulatory fields, it is the judgment of the agency that piecemeal regulation of individual hazards in any of the three regulatory fields by any other agency of government would be disruptive and contrary to the public interest. Should it be demonstrated that further specific regulatory action is required prior to the completion of an FRA rulemaking addressing a given class of hazards within one of the three major fields, FRA will not hesitate to employ its emergency powers or to initiate special-purpose proceedings directed to the solution of individual problems.

Therefore, as the primary regulatory agency, FRA has exercised and continues to exercise its jurisdiction over the safety of railroad operations. The following discussion will describe the dimensions of the three regulatory fields presently occupied by FRA. In addition, the regulation of employee sleeping quarters and transportation of hazardous materials are discussed as separate problem areas. The discussion is designed to be illustrative rather than exhaustive.

TRACK, ROADBED AND ASSOCIATED STRUCTURES AND DEVICES

The FRA Track Safety Standards (49 CFR Part 213) prescribe geometric and other technicai standards for track structures and roadbed and require a program of inspections. While standards have not been issued related to the dimensions or structural integrity of bridges, tunnels or other similar structures, FRA is exercising its authority with respect to the operational safety of such structures through inspections in response to specific requests and may undertake rulemaking proceedings at a future date. FRA has affirmatively determined that issuance of Federal regulations governing walkways on bridges is not warranted based on the projected cost of installation and the collateral safety problems which would be created (42 FR 22184; May 2, 1977).

. . .

EQUIPMENT

FRA administers and enforces the Safety Appliance Acts (45 U.S.C. 1-16), which were first enacted in 1893. These statutes, which are among the earliest Federal enactments bearing on occupational safety, require certain appliances such as automatic couplers, secure grab irons, and power brakes on all cars and locomotives. FRA and its predecessor agency have implemented these statutes with regulations detailing how safety appliances shall be designed and affixed (49 CFR Part 231) and prescribing inspection and maintenance standards for power brakes (49 CFR Part 232).

. . .

HUMAN FACTORS

The control of human factors which impact on the safety of railroad operations is the most complex and difficult of the three regulatory fields which are being addressed under the Federal Railroad Safety Act of 1970. However, FRA, with the cooperation of interested parties, has made major strides in addressing the most serious areas of concern related to this facet of railroad operations. A board survey of railroad operating rules and practices (including employee training and testing) has been initiated through mandatory filing of specified information; and railroads have been required to conduct programs of instruction, operational tests, and inspections to enforce compliance with their own safety rules (49 CFR part 217). Initial uniform operating rules pertaining to the protection of employees working between or under rolling equipment, operations within yard limits, and rear flag protection have now been issued (49 CFR part 218). See 42 FR 2318; January 11, 1977, and 42 FR 5059; January 27, 1977. Procedures governing the use of radio communications and rules governing the issuance of train orders by radio have also been adopted (49 CFR part 220, issued at 42 FR 5065; January 27, 1977).

FRA also administers and enforces the Hours of Service Act (45 U.S.C. 61-64b), which limits the hours of service of certain major categories of employees who are engaged in or connected with railroad operations. (See discussion below on Employee Sleeping Quarters.)

Again, FRA will continue to study the need for further rulemaking in the field of human factors. In the meantime, FRA will continue to exercise its authority over railroad operations by

enforcing standards already published, by utilizing its emergency powers, by promoting adherence to carrier safety rules, and by instituting any special proceedings which may be deemed necessary. As the primary regulatory agency in the area of railroad operations, it will be the responsibility of FRA to evaluate what further Federal action may be required.

EMPLOYEE SLEEPING QUARTERS

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DEPARTMENT OF TRANSPORTATION HAZARDOUS MATERIALS REGULATIONS

. . .

C. OSHA JURISDICTION

As noted above, FRA has determined that a territorial approach to the exercise of its statutory jurisdiction over railroad safety such as that proposed in the NPRM would deplete energies and resources better devoted to the safety of railroad operations. If FRA were to address all occupational safety and health issues which arise in the railroad yards, shops, and associated offices, the agency would be forced to develop a staff and field capability which, to an extent, would duplicate the capability already possessed by OSHA. In view of this situation, FRA recognizes that OSHA currently is not precluded from exercising jurisdiction with respect to conditions not rooted in railroad operations nor so closely related to railroad operations as to require regulation by FRA in the interest of controlling predominant operational hazards.

The following survey of OSHA standards is intended to aid the railroad industry in evaluating the breadth of FRA's exercised jurisdiction by contrasting the roles of FRA and OSHA. This discussion cannot be regarded as definitive, since considerable experience in adjusting the relationship of FRA and OSHA standards will likely be required before an optimum Federal regulatory program can be achieved. All statements concerning OSHA and FRA authority and the applicability of individual regulations should be regarded as statements of general principle.

Again, in reading this discussion it should be kept in mind that to the extent matters addressed by the OSHA regulations are connected with or relate to railroad operations and may interact with or create operational hazards, it may be necessary for FRA and OSHA to consult concerning the interpretation or modification of such standards. As the primary regulatory agency concerned with railroad safety, FRA will not hesitate to adopt its own standards to assure a safe environment for railroad operations and to promote regulatory consistency.

GENERAL INDUSTRY STANDARDS

The areas discussed below correspond to subparts in the Occupational Safety and Health Standards (29 CFR Part 1910). FRA is aware that OSHA has proposed revocation of certain of these standards (42 FR 62734; December 13, 1977). However, since it is not possible to project at this time what final action OSHA might take with respect to individual provisions, this discussion addresses the OSHA regulations currently in effect.

WALKING-WORKING SURFACES (SUBPART D)

OSHA regulations concerning working surfaces deal with such matters as ladders, stairways, platforms, scaffolds and floor openings. Generally, these regulations are applicable in railroad offices, shops, and other fixed work places. There are three principal exceptions to the rule. First, they would not apply with respect to the design of locomotives and other rolling equipment used on a railroad, since working conditions related to such surfaces are regulated by FRA as major aspects of railroad operations.

Second, as the agency which has exercised jurisdiction over railroad operations, FRA is responsible for the safe movement of rolling stock through railroad repair shops. OSHA requirements for general industry are in some respects inconsistent with the optimum safety of employees in this unique environment where hazards from moving equipment predominate. Therefore, OSHA regulations on guarding of open pits, ditches, etc., would not apply to inspection pits in locomotive or car repair facilities. FRA is better equipped to assess proper clearance technology and employee knowledge of existing industry practices as well as the prevalence and severity of hazards represented by specific injury occurrence codes in accident/incident reporting statistics. FRA is responsible for determining what additional regulatory steps, if any, any be necessary in this area in light of overall safety considerations.

Third, the OSHA regulations would not apply to ladders, platforms, and other surfaces on signal masts, cantenary systems, railroad bridges, turntables, and similar structures or to walkways beside the tracks in yards or along the right-of-way. These are

areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety. Therefore, FRA will determine the need for an feasibility of general standards to address individual hazards related to such surfaces, keeping in mind the requirement of proper clearances and the familiarity of employees with existing industry designs. It should be noted that FRA and its predecessor agency have traditionally required the correction of defective ladders and walkways on signal structures under the authority of the Signal Inspection Act (49 U.S.C. 26(e)). Further, the FRA Track Safety Standards require the control of vegetation growth immediately adjacent to roadbed which might interfere with employees performing normal trackside duties (49 CFR §213.37). FRA will not hesitate to use its emergency powers to achieve the correction of other, similar problems.

MEANS OF EGRESS (SUBPART E)

By their own terms, OSHA regulations concerning egress do not apply to rolling equipment. However, the regulations do apply to the extent of the regulatory language to fixed railroad facilities other than employee sleeping quarters covered by the Hours of Service Act, as amended.

POWERED PLATFORMS, MANLIFTS, AND VEHICLE-MOUNTED WORK PLATFORMS (SUBPART F)

. . .

OCCUPATIONAL HEALTH AND ENVIRONMENTAL CONTROL (SUBPART G)

These rules impose certain standards related to ventilation, occupational noise exposure, and radiation. The rules apply

according to their own terms in the railroad industry, with the following exceptions.

First, the OSHA ventilation standards (29 CFR §1910.94) do not contain any provisions which address hazards growing out of railroad operations, as such. By their terms, they have no application to locomotive cab or caboose environments, to passenger equipment, or to operational situations in yards or along the right-of-way.

Second, FRA views the question of occupational noise exposure of employees engaged in railroad operations, during their involvement in such operations, as a matter comprehended by the regulatory fields over which FRA has exercised its statutory jurisdiction. FRA is therefore responsible for determining what exposure levels are permissible, what further regulatory steps may be necessary in this area, if any, and what remedial measures are feasible when evaluated in the light of overall safety considerations....

. . .

Any review of further remedial measures in the area of occupational noise exposure in locomotive cabs and cabooses must take into account the need to preserve the alertness of employees to rail transportation hazards affecting the employees, passengers and the general public along the right-of-way. Only the primary regulatory agency in the area of railroad safety is equipped to evaluate these considerations and to fashion appropriate solutions. The same considerations apply to employees' exposure to retarder noise and other noise emanating primarily from railroad operations.

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HAZARDOUS MATERIALS (SUBPART H)

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PERSONAL PROTECTIVE EQUIPMENT (SUBPART I)

OSHA regulations concerning personal protective equipment apply according to their terms, except to the extent the general requirements might be read to require protective equipment responsive to hazards growing out of railroad operations. For instance, OSHA could not prescribe attire designed for mandatory use of an employee while involved in uncoupling cars or operating a locomotive. Close OSHA-FRA cooperation will be required to ascertain whether requiring the use of certain protective equipment by persons working along the railroad right-of-way, without additional requirements assuring attention to rail transportation hazards, may tend to aggravate such hazards by obscuring vision or muffling the noise of approaching trains. If necessary, FRA will not hesitate to issue regulations placing conditions on the use of protective equipment in such circumstances or otherwise regulating its use.

GENERAL ENVIRONMENTAL CONTROLS (SUBPART J)

. . .

MEDICAL AND FIRST AID (SUBPART K); FIRE PROTECTION (SUBPART L)

. . .

COMPRESSED GAS AND COMPRESSED AIR EQUIPMENT (SUBPART M)

. . .

MATERIALS HANDLING AND STORAGE (SUBPART N)

. . .

MACHINERY AND MACHINE GUARDING (SUBPART O); HAND AND PORTABLE POWERED TOOLS AND OTHER HAND-USED EQUIPMENT (SUBPART P); WELDING, CUTTING AND BRAZING (SUBPART Q); ELECTRICAL (SUBPART S)

. . .

TOXIC AND HAZARDOUS SUBSTANCES (SUBPART Z)

The OSHA regulations apply according to their terms, except with respect to the shipment or transportation of hazardous materials, which is controlled by the Department of Transportation Hazardous Materials Regulations, and the regulation of air contaminants in locomotive cab and caboose environments.

It is the judgment of FRA that the exposure of operating employees to air contaminants in the locomotive cab or caboose environment is an issue integrally related to the ability of employees to perform their duties and to the regulation of the rail equipment itself. Thus, air contaminant exposure in those particular environments must be viewed as a concern within two of the regulatory fields over which FRA has exercised jurisdiction (rail equipment, human factors)....

. . .

CONSTRUCTION STANDARDS

Section 1910.12 of OSHA's General Industry standards provides that the standards contained in 29 CFR Part 1926 relating to construction work are adopted as regulations under Section 6 of the OSH Act and shall apply to every "employment" engaged in construction work. "Construction work" is broadly defined to include construction, alteration, and/or repair, including painting and decorating. To the extent that hazardous construction working conditions do not fall within FRA's exercise of authority relating to the safety of railroad operations, the OSHA standards apply according to their terms in the railroad industry.

D. CONCLUSION

The foregoing discussion of FRA's view of the proper role for it to play with respect to the railroad industry in the overall Federal occupational safety and health regulatory scheme is intended to assist all interested parties in their efforts to determine the extent to which FRA regulations and OSHA regulations will apply to working conditions within the railroad industry. As was stated earlier in this notice, the primary intent of FRA is to assure an effective and coherent railroad occupational safety and health program. We believe the policy set forth in this document will assure that each of the principal Federal agencies charged with the responsibility for carrying out this program, that is, FRA and OSHA, will concentrate its efforts in those areas in which it possesses the greatest experience and expertise. In those cases in which there may be some question as to which is the primary regulatory agency, cooperative efforts between the two agencies should avoid the creation of regulatory gaps on the one hand, or

unnecessary duplication on the other. At any time that a hazardous working condition impacts upon the overall safety of railroad operations, FRA will take the initiative in developing a proper regulatory response.

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Issued in Washington, D.C., on March 10, 1978.

JOHN M. SULLIVAN,
Administrator.

APPENDIX I

DEPARTMENT OF TRANSPORTATION
Federal Railroad Administration
[49 CFR Chapter II]
[Docket No. RSB-1 Notice 1]

WALKWAYS ON RAILROAD BRIDGES, TRESTLES, AND SIMILAR STRUCTURES

Advance Notice of Proposed Rulemaking

The Federal Railroad Administration (FRA) is studying the need for a Federal regulation to require walkways on railroad bridges, trestles and similar structures. The purpose of this Notice is to solicit views and comments from the public as to the necessity, cost and benefit to be derived from Federal regulation in this area.

Background Information

On July 15, 1975, the Railway Labor Executives Association (RLEA) filed a rulemaking petition requesting that FRA issue a regulation "to require that all railroad bridges, trestles and similar structures used by trains and switching movements on all railroads in the United States have safe walkways placed along them" (FRA Rulemaking Petition 75-5).

. . .

Public Participation Requested

FRA believes that additional information is required concerning the necessity for, the cost of, and the benefits to be derived from, a Federal regulation requiring walkways on railroad bridges, trestles and similar structures. FRA solicits written comments from the public, particularly from individual States, the railroad industry and railroad employee organizations.

. . .

Issued in Washington, D.C. on November 9, 1976.

ASAPH H. HALE,
Administrator

APPENDIX J

DEPARTMENT OF TRANSPORTATION
Federal Railroad Administration
[49 CFR Chapter II]
[Docket No. RSB-1, Notice 2]

WALKWAYS ON RAILROAD BRIDGES, TRESTLES, AND SIMILAR STRUCTURES

Termination of Rulemaking Proceeding

AGENCY: Federal Railroad Administration, DOT

ACTION: Termination of rulemaking proceeding.

SUMMARY: On November 15, 1976, the Federal Railroad Administration (FRA) published an advance notice of proposed rulemaking (ANPRM, 41 FR 50302) in response to two petitions for rulemaking filed by the Railway Labor Executives Association (RLEA). The ANPRM stated that FRA was studying the need for a Federal regulation requiring the construction of walkways on railroad bridges, trestles, and similar structures. Interested persons were requested to comment as to the necessity for, cost of, and benefit to be derived from a Federal regulation concerning this subject. After additional study and analysis of the comments submitted in response to the ANPRM, the FRA has decided to terminate this rulemaking proceeding.

. . .

Issues Considered

1. What is the necessity for a Federal regulation requiring walkways on railroad bridges, trestles and similar structures?

Several commenters expressed the opinion that a rule requiring walkways on all railroad bridges, trestles and similar structure would not contribute to the safety of railroad employes. They contended that experience has shown that the presence or absence of walkways has little influence on the injury rate for employees.

. . .

Other commenters urged FRA to review accident statistics to determine whether the lack of walkways on railroad bridges, trestles or similar structures represents a substantial danger of employee injury when compared with other employee injury causes. FRA has reviewed accident data for the 13-year period from 1962 through 1974. A comparison of three cause codes relating to falls from or through bridges or trestles with a single cause code relating to "falling on stairways, ramps, station platforms, etc." revealed almost five times as many injuries resulting from the later category as resulted from all three categories related to bridges and trestles.

2. Would the cost of providing walkways on bridges, trestles and similar structures outweigh the benefits to be derived?

Many of the commenters emphasized the potentially high cost of compliance should a rule requiring walkways on all bridges, trestles and similar structures be issued. Data submitted by one

commenter indicated that there are approximately 2,100 miles of bridges, trestles and similar structures that do not presently have walkways. This commenter provided an estimated cost range for the construction of walkways that varied from a low of $45 per linear foot of walkway when installed concurrently with deck renewal or new construction, to a high of $100 per linear foot for installations on existing structures. The FRA agrees with this commenter that $65 per linear foot of walkway would be a reasonable average estimate for determining the overall potential cost to the industry. Given this estimate, a program requiring the construction of walkways along one side of the 2,100 miles of structures not presently so equipped would cost in excess of $700 million. Even if a more restricted approach were taken, requiring the construction of walkways at the time of deck renewal or new construction only, the potential cost would be approximately $500 million.

Nine commenters, including two State agencies, expressed the concern that a requirement to provide walkways on all such structures would have a negative impact on overall railroad safety because it would lead to a diversion of railroad resources from other maintenance or improvement programs that would have a more direct and significant impact on safety. Several commenters suggested that the shear magnitude of the cost of such a program would lead to the need for Federal financial assistance to prevent the cost of compliance from resulting in line abandonments and railroad insolvencies.

. . .

Conclusions and Action

In compliance with the President's policy of economic impact evaluation of Federal agency actions...the FRA has determined that the issuance of a Federal rule requiring walkways on railroad bridges, trestles, and similar structures cannot be justified at the present time. First, any such rule would impose significant added burdens in terms of the large dollar cost to the railroad industry for construction of the walkways. ...Secondly, neither the commenters nor the FRA has been able to demonstrate that such a rule would result in a definite or measurable improvement to railroad employee safety....

. . .

Issued in Washington, D.C. on April 26, 1977.

BRUCE M. FLOHR
Deputy Administrator

APPENDIX K

DEPARTMENT OF TRANSPORTATION
Federal Railroad Administration
49 CFR Part 218
[FRA Docket No. ROS-2, Notice No. 1]
RIN 2130 — AA48

Bridge Worker Safety Rules

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: FRA proposes to establish safety standards for the protection of workers on railroad bridges.

. . .

SUPPLEMENTARY INFORMATION:

Legislative Background

Section 19 of the Rail Safety Improvement Act of 1988 ("RSIA"), Pub. L. 100-342, 102 Stat. 624 (June 22, 1988), amended section 202 of the Federal Railroad Safety Act of 1970 ("FRSA"), 45 U.S.C. 431, by adding a new subsection (n), which provides that FRA should " *** issue such rules, regulations, orders, and standards as may be necessary for the safety of maintenance-of-way employees, including standards for bridge safety equipment, such as nets, walkways, handrails, and safety lines, and requirements relating to instances when boats shall be used."

FRA intends in this proceeding to make comprehensive determinations regarding the regulatory action needed to address the safety of workers on railroad bridges. In considering the necessity of such rules, pursuant to section 19 of the RSIA, one issue to be addressed is the adequacy and appropriateness of currently applicable federal standards issued by the Occupational Safety and Health Administration (OSHA).

Jurisdictional Background

FRA has a complementary relationship with OSHA that includes overlapping jurisdiction with respect to occupational safety and health issues in the railroad industry. Just as FRA lacks safety jurisdiction in non-railroad environments, OSHA lacks jurisdiction over safety issues relating directly to railroad operations—a subject over which FRA's authority is exclusive. Thus, one question is whether the occupational safety issues presented by work on railroad bridges are so inherent to the railroad environment that FRA alone should regulate them, or whether they cut across industry lines without raising special concerns in the railroad context and thus are properly addressed by general OSHA standards.

OSHA has not promulgated regulations specifically applicable to work on railroad bridges or to work on other types of bridges. However, a variety of OSHA rules addressing occupational safety issues commonly found in railroad bridge work are found in part 1926, Safety and Health Regulations for Construction, and part 1910, Occupational Safety and Health Standards (usually referred to as general industry standards). Where other agencies possess overlapping jurisdiction, section 4(b)(1) of the Occupational

Safety and Health Act, 29 U.S.C. 653(b)(1) contemplates that federal safety agencies can displace OSHA:

> Nothing in the Act shall apply to working conditions of employees with respect to which other Federal agencies *** exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

In 1978, FRA issued a Statement of Policy setting out the respective areas of jurisdiction of FRA and OSHA in the railroad industry. 43 FR 10583 (March 14, 1978). In that Statement, FRA drew the jurisdictional line between "occupational safety and health" issues in the railroad industry and work related directly to "railroad operations," with FRA having jurisdiction over the latter, and OSHA over the former, except where compliance with OSHA regulations could be shown to adversely affect the safety of rail operations. FRA noted that it

> has determined that a territorial approach to the exercise of its statutory jurisdiction over railroad safety *** would deplete energies and resources better devoted to the safety of railroad operations. If FRA were to address all occupational safety and health issues which arise in the railroad yards, shops, and associated offices, the agency would be forced to develop a staff and field capability which, to an extent, would duplicate the capability already possessed by OSHA.

43 FR 10585. Both courts and the Occupational Safety and Health Review Commission have held that the assertion of authority in a policy statement constitutes an exercise of FRA's statutory authority under the rail safety laws sufficient to displace OSHA standards, pursuant to section 4(b)(1) of the OSH Act, with respect to health and safety issues intrinsic to "railroad operations." *Velasquez v. Southern Pacific Transp. Co.*,

734 F.2d 216, 218 (5th Cir. 1984); *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977); *Consolidated Rail Corp.*, 10 OSHC (BNA) 1577 (1982).

The Policy Statement points to FRA's "proper role" as concentrating "its limited resources in addressing hazardous working conditions in those traditional areas of railroad operations (*i.e.*, "the movement of equipment over the rails") in which (FRA) has special competence." 43 FR 10585. After considering the necessity of standards for work on bridges pursuant to section 19 of the RSIA, FRA now believes that such work may be so much a part of railroad operations that FRA should address this issue in its own regulatory program.

FRA has previously addressed working conditions on bridges. After issuing an ANPRM in 1976, holding hearings, and receiving comments on the need for walkways on railroad bridges, FRA concluded that a federal regulation requiring the construction of bridge walkways was not warranted, and FRA terminated the rulemaking proceeding in 1977. 42 FR 22184 (May 2, 1977). Then in the 1978 Policy Statement FRA recognized that OSHA has relevant rules and addressed working conditions on railroad bridges directly:

> The OSHA regulations would not apply to *ladders, platforms, and other surfaces on* signal masts, catenary systems, *railroad bridges*, turntables, and similar structures, or to walkways beside the tracks in yards or along the right-of-way. These are areas which are so much a part of the operating environment that they must be regulated by the agency with the primary responsibility for railroad safety. Therefore, FRA will determine the need for and feasibility

> of general standards to address individual hazards related to *such surfaces*, keeping in mind the requirement of proper clearances and the familiarity of employees with existing industry designs.

43 FR 10587 (emphasis added). As this segment of the Policy Statement indicates, FRA intended to displace OSHA regulations with respect to the surfaces on bridges, *i.e.*, track structures, but did not intend to prevent OSHA from exercising its more general responsibilities for the safety of railroad workers with respect to fall protection and respiratory equipment. However, these distinctions have proved confusing to the regulated community, railroad employees, inspectors, and in some instances, adjudicatory bodies. FRA has recently received a number of legal memoranda addressing these issues from railroads and railroad associations; all of these evidence this confusion. All are available for inspection in the docket of this rulemaking.

Also, labor organizations have complained about confusion regarding the appropriate federal agency to approach when railroad bridge worker safety issues arise. To ameliorate that situation, the Brotherhood of Maintenance of Way Employees (BMWE), on one hand, has urged aggressive OSHA enforcement of its standards on railroad bridges, and on the other hand, was the moving party seeking inclusion of this issue in the RSIA. Accordingly, FRA understands the BMWE's objective to be clarity as between FRA and OSHA, not some specific result. FRA agrees that work on railroad bridges exposes workers to significant risk of harm. To be effective in reducing those risks, the appropriate federal standards for personal protection, and the identity of the agency responsible for their enforcement, must be crystal clear.

Bridge Work Hazards

Most railroad bridges crossing water, streets, and valleys were built many decades ago. In that time, railroad traffic has changed, with many bridges now having to support passage of heavier cars and denser traffic. Due to the considerable age of railroad bridges and these changing traffic patterns, more frequent maintenance will be necessary, increasing the exposure of workers to bridge maintenance hazards. Those risks are real. ...

. . .

Participation Requested

Having previously reserved at least some aspects of work on bridges to itself through "negative displacement" under section 4(b)(1), FRA now proposes to extend its authority to all aspects of railroad bridge worker safety. ...

. . .

In the railroad safety context, FRA believes that it can address the health and safety hazards confronting railroad bridge workers by issuing and enforcing its own regulations. By affirmatively asserting regulatory authority over all aspects of railroad bridges, both operational and otherwise, FRA can tailor relevant OSHA regulations to take account of the peculiarities of the railroad environment.

Under this proposal, the inspection of bridge worker safety equipment would be completed by the more appropriate inspection force. FRA inspectors possess extensive knowledge of the practices relating to track, signal, and train control operation—knowledge that is essential to safely complete an inspection of the fall protection and personal protective equipment being employed at a given bridge repair site. FRA inspectors

often are aware of construction and repair operations in progress, and can therefore inspect for adequate protective equipment in a timely fashion. In addition, this proposal will prevent duplicative inspection efforts as FRA inspectors, unlike OSHA inspectors, can conduct an inspection of bridge worker safety devices as they complete their periodic track and signal inspections. Finally, FRA's proposal will provide clarity for workers, industry representatives, inspectors, and adjudicatory bodies when issues concerning personal protective equipment and fall protection arises in the field.

FRA's proposed rule mirrors OSHA regulations concerning personal protective equipment and fall protection. However, changes have been made as necessary accommodate the railroad environment, and those changes are printed in italics for convenience.

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List of Subjects in 49 CFR Part 218

Railroad bridge work safety, Railroad safety.

The Proposed Rule

Note: Italicized portions indicate changes from OSHA regulations.

In consideration of the foregoing, FRA proposes to amend part 218, title 49, Code of Federal Regulations as follows:

PART 218—[AMENDED]

1. The authority citation for part 218 continues to read as follows:

Authority: 45 U.S.C. 431, 438, as amended; Pub. L. 100-342; and 49 CFR 1.49(m).

2. By amending the table of contents to add subpart F as follows:

Subpart F—Performing Work on Bridges

Sec.

218.71 Purpose and scope.
218.72 Walkways and railings.
218.73 Safety belts, lifeline, and lanyards.
218.74 Safety nets.
218.75 Working over or near water.
218.76 Respirator protection.
218.77 Head protection.
218.78 Scaffolding.
218.79 Personal protective equipment.
218.80 Foot protection.
218.81 Eye and face protection.

. . .

Issued in Washington, DC, on January 24, 1991.

Gilbert E. Carmichael,
Federal Railroad Administrator

APPENDIX L

There was in force at the time of this occurrence a regulation promulgated by the Occupational Safety and Health Administration which in part states:

> Safety nets shall be provided when work places are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

If you decide that the Chicago and North Western Transportation Company failed to comply with this regulation you may consider that fact together with all the other facts and circumstances in evidence in determining whether or not the Chicago and North Western Transportation Company was negligent.

(C. 570)

APPENDIX M

DEPARTMENT OF TRANSPORTATION'S INTERPRETATION OF SECTION 4(b)(1) OF OSHA

SUBJECT: Interpretation of section 4(b)(1) of the Occupational Safety and Health Act of 1970

FROM: General Counsel

TO: The Deputy Secretary

The major factor preventing completion of jurisdictional agreements with the Department of Labor, Occupational Safety and Health Administration (OSHA), has been, and continues to be, differing interpretations by OSHA and this Department of section 4(b)(1) of the Occupational Safety and Health Act of 1970 (the Act). The position of OSHA is set forth in an undated, unsigned memorandum handed to you by Labor Department Solicitor Kilberg on September 6, 1974.

I.

Section 4(b)(1) of the Act provides:

"Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

II.

Threshold Jurisdiction: "Statutory Gap Theory"

The crux of the DOT-OSHA disagreement relates to the manner in which this seemingly simple section is read. OSHA concentrates exclusively on the last full phrase in the section, "exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." The OSHA interpretation depends upon reading "to prescribe or enforce standards or regulations affecting occupational safety or health" as modifying "statutory authority". Thus, OSHA reaches its position that the section 4(b)(1) exemption can apply only when another agency has specific, express statutory authority relating to occupational safety and health. OSHA does not accept the term "affecting" in its common meaning (to produce an effect upon, influence, or make an impression upon). The Solicitor asserts that agency standards must eliminate or reduce any condition perceived by OSHA as a hazard to workers for OSHA jurisdiction to be preempted.

The DOT Office of the General Counsel does not agree with OSHA's interpretation of this threshold issue. Rather, we construe section 4(b)(1) to mean:

"Nothing in [the] Act shall apply to working conditions... with respect to which other Federal agencies...prescribe or enforce standards or regulations affecting occupational safety or health."

The phrase "exercise statutory authority" means only that a Federal agency must have authority to prescribe directly, rather than indirectly through contract compliance or similar provisions. The phrase "working conditions" is placed in a frame of reference

by "of employees", and "with respect to which" clearly relates (and in this respect OSHA agrees) to "working conditions". The standards or regulations prescribed by another Federal agency (rather than the underlying statutory authority to prescribe such standards or regulations) must affect occupational safety or health.

Simple logic demands rejection of the OSHA interpretation. If, as OSHA has indicated, the Mining Enforcement and Safety Administration (MESA), Department of the Interior, is the only Federal agency, other than OSHA, which administers statutes designated primarily and exclusively to assure workers safe and healthful conditions of employment, and if OSHA is correct that only through such specific authority can the section 4(b)(1) exemption be triggered, the Congress would never have written that section of the Act in the manner in which it appears.

Section 4(b)(1), as interpreted by OSHA, would simply state:

"Nothing in this Act shall apply to working conditions of employees with respect to which MESA and State agencies acting under section 274 of the Atomic Energy Act of 1954...prescribe or enforce..."

The Congress obviously did not intend such a result. In discussing the exercise of authority by other agencies, Mr. Steiger stated:

"Both the substitute and H.R. 16785 provide that the act shall not apply where another Federal agency is exercising authority to prescribe or enforce occupational safety and health standards... While this section does not foreclose the authority of the Secretary of Labor in instances where another agency or department has statutory authority in the area of occupational

safety and health, but has taken no action, it is anticipated that these instances will be exceedingly rare. It is intended that the Secretary of Labor will not exercise his authority where another agency with appropriate jurisdiction has taken steps to exercise its authority, even though the action might be at the formative stage of regulations or enforcement." (Legislative History of the Occupational Safety and Health Act of 1970, ("Legislative History"), Subcommittee on Labor of The Committee on Labor and Public Welfare, 92nd Cong., 1st Sess., p. 997.)

It is difficult to imagine that the Congress was unaware that Federal agencies administer statutes which do not speak specifically to the occupational safety or health of workers, yet authorize the promulgation of regulations and standards affecting these conditions.

III.

Agency Implementation: "Regulatory Gap Theory"

It is essential to understand the meaning of "working condition" in section 4(b)(1). OSHA asserts that the phrase relates to a particular hazardous working condition. This interpretation classifies every minute detail of a working environment as a separate, identifiable condition constituting a specific hazard to workers. Thus, if an agency regulating a field of activity has not promulgated a specific standard relating to an identifiable detail of the working environment, the section 4(b)(1) exemption would not apply with respect to that particular condition. Apparently, in the view of OSHA, the failure of an agency to promulgate a standard because none is needed, or the failure of an agency to promulgate a standard which states a particular condition need not be met, would constitute a failure of

the agency to exercise its jurisdiction. Rejection by OSHA of "negative regulation" ignores reality.

We believe "working condition" can only be interpreted in light of the dual purposes of the Act. The term is not defined in the Act and the legislative history is far from precise on this point. At times the discussion with respect to the application of the exemption used the term "particular working conditions" (Legislative History. p. 162), and at other times it used the term "working condition" (Legislative History, p. 864). What was meant by "particular", however, was never discussed. Parts of the discussions relating to the exemptions also used the term "industry" (Legislative History, p. 1919-20).

The Act was intended both (1) to provide comprehensive coverage to the working men and women of this country, and (2) to avoid duplication of effort and confusion because of overlapping Federal jurisdictions. It is these two objectives that form a basis for defining "working condition". The "working condition" exemption must be interpreted to refer to the specific areas which are regulated by an agency in the interest of safety or health and which directly affect the statutory responsibilities of the agency.

IV.

Effect of Agency Action: "Employee Gap Theory"

Recently, OSHA has propounded, the Occupational Safety Review Commission has accepted, yet another manner in which the section 4(b)(1) exemption can be rendered meaningless, even when an agency has and exercises authority to alleviate a hazardous working condition. OSHA, in arguing the exemption

cannot be applied to an entire industry (and no agency disputes this reasoning) examines the statutory words "with respect to which" and concludes the phrase relates to "working conditions" rather than to "employees". Nevertheless, OSHA now insists that an agency's regulation of a working condition does not trigger the exemption unless the authority of the agency runs directly to a worker subject to the agency's jurisdiction. Thus, a condition recognized as hazardous by a cognizant agency, and subject to agency standards to prevent injury, is subject to OSHA's jurisdiction whenever an employee other than one subject to the agency's authority is present.

The "employee gap" theory is inconsistent with OSHA's valid reading of "working condition...with respect to which" and with common sense. If an agency is charged with responsibility for public safety, or even the safety of a class of the public, its specific discharge of that responsibility is valid with respect to all who may be exposed to the condition.

V.

Record Keeping

Section 24(a) of the Act requires the Secretary of Labor to compile certain accident figures. This section, however, specifically provides that it "shall not cover employments excluded by Section 4 of the Act." OSHA maintains that the provision in section 24 referring to section 4 refers exclusively to section 4(a). Section 4(a) essentially provides that the Act supplies to "employment" performed in all the States and other areas under the jurisdiction of the United States.

We disagree with that interpretation of the relationship of section 24 to section 4. The exclusion in section 24 applies to all of section 4. If it were meant to apply only to section 4(a), it would have been relatively simple to indicate this limitation, but this was not done. Also section 4(a) is generally a statement of *applicability*, and it is section 4(b)(1) that basically contains the *exemptions*. OSHA's reasoning would require reading "Nothing in this Act" as meaning "Nothing in this Act except section 24."

VI.

Summary

We have been engaged in negotiations to conclude memoranda of understanding to delineate jurisdictional responsibilities of OSHA and DOT administrations. Each time agreement appears possible, OSHA has developed a new "theory" to prevent recognition of DOT authority. As noted in this memorandum, we cannot accept the various theories propounded by OSHA, nor can we enter agreements subject to those theories.

Rodney E. Eyster

APPENDIX N

March 7, 1989

Ms. Cynthia L. Attwood
Associate Solicitor
Solicitor of Labor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Ms. Attwood:

I write in response to your request for answers to two questions: (1) does the Federal Railroad Administration (FRA) have regulations to ensure that fall protection equipment is provided railroad workers where appropriate; and (2) does FRA have jurisdiction over the safety of workers performing track repair and maintenance?

With regard to fall protection for railroad workers, FRA does not now have such a rule in place. However, we expect to publish in the near future a Notice of Proposed Rulemaking concerning the safety of railroad employees working on bridges. *See* Rail Safety Improvement Act of 1988 (Pub. L. 100-342, 102 Stat. 624, June 22, 1988). We expect the proposed rule to address personal protective apparatus for use by railroad employees working on walkways, over or near water, or on scaffolds. These devices would include safety belts, lifelines, lanyards, safety nets, boats, railings and respirators.

As to protection of maintenance-of-way workers performing track maintenance or repair, responsibility for their safety is

FRA's, according to the Policy Statement issued by FRA March 14, 1978, which delineates respective areas of FRA and OSHA jurisdictional authority. 43 F.R. 10583. Following prefatory statements that FRA activity in the area of occupational safety will concentrate on the "safety of railroad operations" (*i.e.*, "conditions and procedures necessary to achieve the safe movement of equipment over the rails"), the Policy Statement notes that ". . . proper precautions to assure that trackmen are not struck by trains or other equipment moving over the rails are part of the safety of railroad operations." 43 F.R. 10585.

In addition, the Policy Statement provides that "...OSHA regulations would not apply to...walkways beside the tracks in yards or along the right-of-way. These are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety." 43 F.R. 10587.

I hope this information is helpful. If you have any further questions, please contact me.

Very truly yours,

[Original Signed By]

Gregory B. McBride
Assistant Chief Counsel
for Safety

cc: Associate Administrator for Safety
Regional Director, Region 2